No. 2712

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL OESTING,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

OPENING BRIEF FOR PLAINTIFF IN ERROR.

HERBERT CHOYNSKI,
JAMES RALEIGH KELLY,
Attorneys for Plaintiff in Error.

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This is an appeal from a judgment of fine and imprisonment after a plea of guilty to an indictment which does not state a crime. The judgment is error, because the plea of guilty is an admission of the truth of the facts set forth in the indictment and not a confession of the violation of any law. If the indictment does not set forth a crime, the plea of guilty does not admit the commission of a crime. This principle is so elementary that it should not need authority to support it, but nevertheless we cite a few authorities on this proposition.

In Arbitranode v. State, 67 Ind. 267, the defendant plead guilty and was fined; he appealed, claim-

ing the facts alleged in the indictment not to constitute an offense, and the court held:

> "if it be true that the facts alleged do not constitute an offense, the appellant has lost nothing by pleading to the indictment. He may appeal and attack the indictment for the first time in this Court",

citing Henderson v. State to the same effect, 60 Ind. 296, and other cases; also Buskirk's Practice, section 414.

It is held in State v. Levy, 24 S. W. 1026:

> "* * * the attorney general contends that the defendants having pleaded guilty are in no position to question the correctness of the proceedings which resulted as aforesaid" (4-year sentence) "but this is a mistake. The effect of such a plea only amounts to an admission by record of the truth of whatever is *sufficiently* alleged in the indictment, and no confession, however large and explicit, will keep a defendant from taking advantage of faults appearing of record. *If no crime is charged in the indictment, then none is confessed by pleading thereto.*" Citing 1 Chitty Crim. Law, pp. 431, 662, 663; Fletcher v. State, 12 Ark. 169; 1 Bishop Crim. Procedure, section 795 and cases; Whart. Crim. Plead. (9th ed.) 413.
>
> "Numerous decisions of this Court attest that a party defendant in a criminal case may take advantage of a material defect apparent of record, though such point be raised for the first time in this Court" (Supreme Court). Citing McGee v. State, 8 Mo. 495; State v. Van Matre, 49 Mo. 268; State v. Meyers, 99 Mo. 107, 12 S. W. 516; 1 Bish. Crim. Pro. sections 1368, 1370.

Other cases are:

Territory v. Miller, 4 Dak. 173, 29 N. W. 7;
Boody v. People, 43 Mich. 34, 4 N. W. 549;
Carper v. State, 29 Ohio St., 572;
Crow v. State, 6 Tex. 334.

Held in Fletcher v. State, 12 Ark. 169, that by a plea of guilty defendant but confesses himself guilty in manner and form as charged in the indictment; and if the indictment charges no crime against the law, none is confessed.

It is said in 12 Cyc., page 801:

> "Defendant may appeal from a judgment based on his plea of guilty, on the ground that the indictment does not state facts constituting a crime, as such a plea does not admit the validity or sufficiency of the indictment * * *."

Similar language is employed at 12 Cyc. 436 and 12 Cyc. 484, there being numerous cases cited to substantiate the statements.

Defendant is accused of violating section 215 of the Federal Penal Code, which provides a penalty for using the United States mails in the prosecution of a scheme to defraud or obtain money by false pretenses.

It is alleged that Dr. Paul Oesting, who did business under several fictitious names, one of them being "Jordan's Museum of Anatomy, a corpora-

tion", organized and existing under and by virtue of the laws of the State of California, did "under the guise and name of said Jordan's Museum of Anatomy", devise a scheme to defraud "by means of certain false pretenses, representations or promises" to be effected by means of the postoffice.

It is not a crime against the United States or against anyone else to do business under a fictitious name; the various statutes even prescribe certain prerequisites to the collection of debts by persons so doing business (sections 2466 to and including 2472 Civil Code of the State of California). Nor is it a crime on the part of Dr. Oesting for a corporation to devise a scheme, and to say that one schemed or acted "under the guise and name of a corporation" is no more than an accusation against the corporation. This is more particularly true as to the *scheme,* for one in *devising* a scheme acts privately, as distinguished from the publicity attached to the execution of the scheme. To say that one forms a conception under the "guise and name of a corporation", is to say that the conception is that of the corporation. He acts "for" the corporation; the "corporation" conceives the scheme. There is nothing uncertain or vague about the allegations as to who is making the scheme; either it is the corporation, or we have the delusions of insanity. If Dr. Oesting conceived a scheme "under the guise and name of a corporation" and his act was not the act of the corporation, then the doctor was insane, for the "scheme" was something in his

mind and he must have had a delusion that he was not Dr. Oesting, but

> "* * * an artificial being, invisible, intangible, and existing only in contemplation of the law * * * " having the divine attribute in his physical being of "immortality", "a perpetual succession of many persons * * * ",

these being some of the attributes of a corporation, according to Chief Justice Marshall, in the famous Dartmouth College Case, 4 Wheat. U. S. 518, 636.

Then the indictment alleges either that the scheme was that of another than the defendant, or that of an insane man.

And even were there a physical act, instead of an act of thinking, an act of the mind purely, the same thing must follow, for one cannot act as a corporation; there must be at least three directors, and a majority of these must act, in which case we would have a charge of conspiracy without a naming or identifying of the conspirators, or even a statement as to how many conspirators there were or that the conspirators were unknown to the grand jury.

But, supposing that Dr. Oesting devised a scheme and that he was not insane, let us see if the scheme was as the indictment attempts to allege, fraudulent. And the Court will please note here that our objection is not that there is any *uncertainty* as to whether or not the scheme is fraudulent, nor that all the statements that it is fraudulent are mere conclusions of law. We claim that it is *absolutely certain* that the scheme, which is set out in full, in

itself refutes the conclusions made as to its fraud; that the District Attorney cannot charge that a man conceived a certain scheme to defraud the public and against the peace and dignity of the United States; that the scheme consisted of eating cream cake on a public thoroughfare; that in the execution of that scheme he mailed a letter ordering the cream cake. The scheme itself would refute the conclusion as to its fraud and the defendant would be released, though he appealed after judgment of imprisonment on a plea of guilty, and without having made any exceptions in the trial Court as to the validity of the indictment.

This class of cases is akin to the prosecutions in state courts for obtaining money by false pretenses, of which cases it has been held, in accordance with common sense, that it is not sufficient to allege fraud, but the scheme must appear to be fraudulent and of such a nature as to be calculated to cause one to part with his money.

In Roper v. State, 33 Atl. 969 (N. J.), the indictment sets forth that defendant "knowingly, falsely and fraudulently" represented that a certain association was a bona fide building and loan association, engaged in business and with $75,000 to loan; the existence of the association is negatived, and it is then set out that defendant did "wilfully, unlawfully and feloniously" obtain $3000 with intent "to cheat and defraud". It is held:

> "In the first place the indictment is plainly insufficient. Its defect is that it does not set

> forth any misstatement that could have caused the prosecutor to part with his money." * * *
>
> "In the case of State v. Vanderbilt, 27 N. J. Law, 328, it was declared that a false representation, to be a criminal pretense within the statute, must be of such a nature as will be sufficient to induce a man to part with his property, and must not be absurd in itself, considered as an efficient cause. * * * The rule of pleading in these cases is entirely settled. Lord Mansfield, in a case before him, said that the indictment must contain a history of the offense; that is the essential facts must be set forth to this extent; that is, if the facts stated shall be proved, the defendant's guilt will be established * * *. The indictment before the Court on this record is fatally defective."

In People v. White, 7 Cal. App. 99, an information for obtaining money under false pretenses alleges that W, in intending by false and fraudulent pretenses to obtain money of F with intent to cheat and defraud F, did "wilfully and unlawfully, knowingly and designedly, falsely and fraudulently" represent to F that M was a responsible business corporation; that M would pay F $100 a week for 65 weeks upon receiving from him $1 for 65 weeks; that other representations were made as to the responsibility of M; that all the representations were false as W knew; that F believed the representations and was thereby induced to deliver money to W.

The information is held bad.

> "The indictment must show that the property was obtained by means of the false pretense alleged. Accordingly when there appears to be

> no natural connection between the pretense and the delivery of the property, such additional facts as are necessary to show the relation must be alleged. A defect in the indictment arising from failure to show the connection between the false pretenses and the obtaining is a material one, and is not cured by verdict."
>
> 19 Cyc. 429.

This Court will notice that in both of the foregoing cases the indictments allege that the transactions were fraudulent and intended to deceive; that they did deceive; that they effected their objects and the money was actually obtained. Yet such allegations are given no weight since the *schemes* are themselves set out and negative the statements made as to their falsity, fraud and unlawfulness. And the defect is not cured by verdict.

What is the scheme?

Dr. Oesting is to advertise that Dr. Jordan *was* a physician practicing in San Francisco, specially qualified to treat certain diseases and had cured many such diseases. Dr. Oesting did not intend to claim in the advertisements that Dr. Jordan still existed at the time the advertising was done, but merely that he *was* a physician prior to that time. And the statement is true as far as appears from the indictment, which only denies the existence of Dr. Jordan at the time set out in the indictment, that is at the time of the advertising. Further, since the indictment says no Dr. Jordan existed at the time of the scheme or advertising, Dr. Oesting was entitled to adopt the fictitious name Dr. Jordan, since it be-

longed to no one else. There is no allegation that Dr. Jordan was a great doctor, or that he had ever existed, and that Dr. Oesting was deceiving the public by holding out that he was that great man.

There is no falsity, as far as appears from the indictment, in the statement (if we take another meaning from it) that Dr. Oesting himself, doing business under this fictitious name, was a physician, practicing in San Francisco, and specially qualified to treat certain diseases and that he had cured many such diseases; there is no denial in the indictment of the ability and knowledge of Dr. Jordan or Dr. Oesting as far as regards the practice of medicine; the allegation that he is a doctor and also the further allegation (which is not claimed to be untrue) that he stated he had been a practicing physician establish professional knowledge and ability. The moment that one is admitted to the practice of a profession, the fact of his knowledge and ability is established. In the eyes of the law an attorney admitted to practice today is as competent as the attorney who has been practicing for many years; and so also with a doctor; his ability cannot be attacked, whatever may be said as to his proper care and other such matters.

The indictment makes the conclusions that Dr. Oesting did not have "proper or professional knowledge *of the condition of said persons*" and did not have "proper or professional knowledge" of whether such persons were diseased or not, "*or whether or not said purported medicine or treat-*

ment was capable of benefiting said persons"; but that is as far as the indictment goes. It seems to be carefully worded to escape any possibility that the defendant might think himself accused of a crime. It alleges, rather than denies Dr. Oesting's professional knowledge and ability in the abstract. As far as this concrete case goes, the fact that letters and other data were to be received and considered shows he intended to have at least some knowledge of the conditions of the persons whom he was to treat.

The advertisements were intended to induce people to correspond with Dr. Jordan relative to real or supposed ailments and Dr. Jordan was to write to such persons and state to each of them with intent to defraud, "irrespective of the symptoms communicated *as aforesaid",* and even where the symptoms indicated health rather than disease, and without any proper knowledge of the real condition of said persons, that such persons were afflicted with diseases which Dr. Jordan could cure and that he would furnish treatments upon payments of sums of money.

As stated before, the allegation of "an intent to defraud" means nothing where the facts are all set out and show no fraud. The facts here show rather the *absence* of fraud, whereas an indictment must rather "negative the honesty of the pretenses" (United States v. Post, 113 Fed. Rep. 853). The symptoms communicated "as aforesaid", that is by letter, were not to be final, or in some cases

were to have no attention paid to them; which is perfectly proper, first, because there were *not only symptoms* communicated even in the letters or by mail, the letters being general as to "the real or supposed ailments", and not confined merely to a list of symptoms. Samples of urine at least, and, as affirmatively appears, many other methods of determining the disease were as a matter of fact resorted to and intended to be resorted to, such as "chemical test papers" (trans. pp. 6 and 10), other data and records (trans. pp. 6, 10 and 22), samples of urine (trans. p. 22), not merely symptoms. The letters show also that personal interviews were requested by defendant. As a matter of fact a doctor might in many instances be wrong in prescribing only according to the symptoms communicated through the mail to him by his patient, and he is often justified in prescribing though there may be no symptoms at all apparent to the diseased person. Suppose a man to write Dr. Oesting to the effect that he has called to see a certain reputable physician in Modoc County, and been advised by the physician to procure a treatment for consumption or for syphilis; that there are no outward marks of the disease as yet or anything apparent to the diseased, or anyone else without special tests, but that, according to the said doctor, the disease does nevertheless exist in a dormant state and will soon become virulent unless treated. The doctor thinks best to use a certain medicine manufactured at Jordan's Museum. Would not Dr. Oesting be

allowed to send the medicine? Would not he be allowed to make any suggestion which he deemed fit as to the cure of consumption or syphilis, and to send or suggest any other medicine that seemed to him proper for the treatment of those diseases? And without regard to the fact that the patient also sent a letter setting forth symptoms that indicate health? There is no allegation that Dr. Jordan or Oesting intended to tell well people that they were sick.

But suppose Dr. Oesting did intend to advise well people that they needed treatment? And suppose he did intend to so advise in certain cases where not only symptoms, but all tests, information, investigation and advice of other physicians showed health? Might he not still have been justified?

In diseases of the genito urinary organs the mind is a potent factor and often when a patient is absolutely normal and all his symptoms indicate health, it is necessary and imperative that treatment should be given him, thus removing the mental distress.

Dr. Robert W. Taylor, clinical professor of genito-urinary diseases at the college of physicians and surgeons (Columbia University) and consulting genito-urinary surgeon to Bellevue Hospital and also to the City (Charity) Hospital, New York, in his text book on genito-urinary diseases, third edition, says:

> "Patients sometimes attribute want of sexual power, due to other cause, to variocele and

> therefore demand relief. So importunate are some of them, and so deaf to reasoning, that *the surgeon is forced to perform the operation for its mental effect.*"

It is common knowledge that people consult a physician complaining of an ailment, who on examination show no physical symptoms of disease, and yet the physician, in the proper and honest discharge of his duties, will agree with the patient and prescribe for him, giving him some harmless medicine and a great deal of encouragement, otherwise the person treated might worry himself into a serious condition.

There is a large class of people who must be so treated and they are by the medical profession termed "hypochondriacs".

Hypochondria is not a physical or functional disorder but is a nervous condition brought about by the patient imagining a fancied condition, and unless steps are taken by a pretended treatment, coupled with encouraging and helpful advice, the patient worries himself into a nervous condition far more serious than the pretended disease.

How often does a small child complain of being sick; the mother will pat the child on the back, give it a little water with sugar in it and say, "take the medicine and you will be well", and straightway the child will forget its ache and pain. If the mother did not do this the child would imagine a severe pain and genuinely suffer, whereas in fact it was merely mental. Here the mother

deceives the child, but can anyone say she does it fraudulently? Was it not done with an honest belief and a desire to help the child, and did it not accomplish its object?

One does not have to go far to find several persons always imagining themselves ill, and if these people on consulting a physician are told abruptly "nothing is wrong with you", they go away imagining themselves misunderstood and genuinely suffer pain, whereas, if the physician will agree with the patient and say, "Yes, here is a medicine" and give a harmless concoction, the patient will feel better and often be cured.

There is nothing in the indictment charging that the defendant, when symptoms, either alone or coupled with other data, indicated health, intended to advise treatment at all, and most certainly there is no charge that defendant intended to advise treatment when he did not honestly believe that it was to the best interests of the patient.

We feel that a fearful state of affairs would exist if every physician who should commit an error in the diagnosis of a case should be punished. The fact that a certain diagnosis, not always but generally follows certain given symptoms indicates the uncertainty of this branch of work of the medical profession, it is deprived of the exactness and nicety of other scientific subjcts by reason of the fact that the nature of the symptoms are generally obtained from the patient who often because of his

ill health and the incidental mental affliction ensuing therefrom is not exact in his statement. Often a diagnosis is the result of guess work, and is based on statements that possess a more palpably objectional feature than do hearsay statements in their relation to the law of evidence. And even where symptoms and other evidence are before a number of eminent physicians in exactly the same way the physicians often disagree; witness the conflicting statements made on the trial of both civil and criminal cases in the Courts.

We have already stated that "proper knowledge", in view of the facts set forth means nothing. Nor does it matter whether the defendant doctor had any knowledge whatever of the real condition of the person corresponding, provided he *thought* he did, which is the real test of criminality, or provided he is advised by another doctor, either in his employ or not, and whom he trusts, that the facts in a particular case warrant or necessitate a particular treatment, or that the facts showed a disease that the defendant could cure, or thought he could cure.

It is not a crime for a doctor or a pharmacist or anyone else to ask for money for furnishing the treatment for a disease which a doctor has already determined to exist, or which he thinks to exist, after due inquiry made by himself or by someone whom he believes capable of determining the matter. If as a matter of fact there is no disease, still the doctor may prescribe if he thinks there is, in

the absence, of course, of criminal negligence. No criminal negligence, nor any negligence or intended negligence is alleged, any more than it is alleged that Dr. Oesting or Dr. Jordan intended to prescribe for persons whom he did not think afflicted. Only that he would claim disease to exist "irrespective of the symptoms theretofore communicated as aforesaid and even in cases where the symptoms indicated health rather than disease"; not in *all* cases where health was indicated, but, we take it, in cases where in spite of the indications of the symptoms communicated disease did nevertheless exist.

There is no doubt that the medicines and treatment were to be given as advertised, but the complaint is that Dr. Oesting was to send

> "certain medicine or treatment not skillfully or properly designed, prepared and of little or no value, for the cure of the aforesaid persons, Dr. Paul Oesting, alias Paul Allen, then and there having no proper or professional knowledge of such persons' conditions, or whether such persons were diseased or not, or whether or not such purported medicine or treatment was capable of benefiting said persons, as he, the said Dr. Paul Oesting, alias Paul Allen, then and there well knew".

The Court will notice that there is no allegation that Dr. Oesting knew the medicine or treatment was not properly designed or prepared, or even thought so, but the contrary is shown, for it is alleged that he was to send the medicine and treatment "for the cure of the aforesaid persons".

There is no uncertainty about the allegation that at some time Dr. Oesting had no proper or professional knowledge of the conditions of the persons to be treated, and that he knew he did not have this knowledge; but it is not alleged that he had *no* knowledge of the persons' conditions; proper and professional knowledge is not necessary; nor as a matter of fact is any knowledge necessary; the pharmacist who follows the direction of the doctor has no knowledge of the condition of the person who is to use his medicine; the doctor does not in all cases personally ascertain the condition of his own patient, he sends samples of the blood and urine to the chemist to make tests, he gets second-hand information from internes as to symptoms; he takes the word of less famous doctors in his employ; he has no professional knowledge whatsoever as to the condition of his patient; yet he prescribes for the disease. He thinks and believes the patient is ill, yet he does not know it.

So as to the alleged lack of proper and professional knowledge of the efficacy of the medicines and treatment. The pharmacist does not even know for whom his medicines are intended, nor what disease they are intended to treat. The doctor uses without question medicines made according to secret formula, not knowing what they contain; he only knows that other doctors have told him that in certain cases the formulae are effective; or perhaps he has read it out of a book.

We are asked to consider it a criminal scheme to enter into communication with various parties; ascertain their condition by various means; disregard the symptoms which they claim to have observed, and which do not bring us to the same conclusion as urinary analysis, blood tests, the testimony of competent physicians who have made physical examinations, pressure experiments, the symptoms observed by others more competent to judge than the afflicted persons, and other data; tell them of their conditions and ask money for prescribing for the diseases; send medicines for their cure, which we think are excellent, but do not know to have been prepared with the proper care and precaution, since we have not personally supervised the preparation either of the medicines or of the various elements contained in them.

If such a scheme is criminal, then every doctor who bases his analysis of the disease on anything outside of the symptoms observed by the patient should be in jail; every physician who sends his patient to have a prescription filled at a drug store belongs in the penitentiary; every professional man who makes a mistake is a scoundrel.

We respectfully submit that the defendant was sentenced for admitting a set of facts not criminal and that the sentence is error.

Dated, San Francisco,
March 15, 1916.

HERBERT CHOYNSKI,
JAMES RALEIGH KELLY,
Attorneys for Plaintiff in Error